INDEX

Page

Opinions below 1

Jurisdiction 2

Question presented 2

Statute involved 2

Statement 5

Argument 7

Conclusion 13

CITATIONS

CASES:

Aronstam v. *James*, 273 Fed. 545 9
Becker Steel Co. v. *Cummings*, 296 U.S. 74 10
Friedman v. *Harris*, 158 F. 2d 187 11
Kahn v. *Garvan*, 263 Fed. 909 9
Kohn v. *Jacob & Josef Kohn*, 264 Fed. 283 9
Lamont v. *Washington & G.R.R. Co.*, 2 Mackey (D.C.) 502 11
La Mettrie v. *James*, 6 F. 2d 479, affirmed, 272 U.S. 731 9
Lyman v. *Campbell*, 182 F. 2d 700 ..... 10, 11
Sullivan v. *Tobin*, 42 App. D.C. 430 11
United States v. *Shannon*, 342 U.S. 288 10

STATUTES:

Assignment of Claims Act, 35 Stat. 411, 31 U.S.C. 203 ..... 7, 10
Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. 1, *et seq.*:
Section 9(a) 2, 9
Section 9(f) 5, 7, 8, 9

MISCELLANEOUS:

F.R. Cir. P., Rule 24(a) 7, 11
Restatement, *Agency*, § 464 11
S. Rept. 1445 on S. 2546, 82nd Cong., 2d. Sess. 13

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 676

RAOUL BERGER, *Petitioner*

v.

MADELEINE DU PONT RUOFF

and

J. HOWARD MCGRATH,

Attorney General of the United States

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT ATTORNEY GENERAL IN OPPOSITION

OPINIONS BELOW

The District Court filed no written opinion. The *per curiam* opinion of the Court of Appeals (R. 24) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered March 13, 1952 (R. 26). The petition for a writ of certiorari was filed March 27, 1952. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Petitioner, an attorney, was retained to recover property vested under the Trading with the Enemy Act, under an agreement making his fee payable out of the recovered property and granting him an attorney's lien on the recovery. The question is whether, in a suit brought under Section 9(a) of the Act to recover the property, petitioner, upon his discharge without cause, may intervene as of right not merely to assert a lien against his former client's recovery, but to assert his former client's claim against the Custodian.

STATUTE INVOLVED

Sections 9(a) and 9(f) of the Trading with the Enemy Act (40 Stat. 419, as amended, 50 U.S.C. App. 9(a) and 9(f) provide:

> Sec. 9 (a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him here-

under and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute

a suit in equity in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered

against the claimant or suit otherwise terminated.

* * * * * * * *

(f) Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

STATEMENT

Acting under the authority of the Trading with the Enemy Act, respondent vested in himself certain property of Madeleine du Pont Ruoff (R. 3), the plaintiff in the principal action now pending in the District Court. On October 7, 1948, plaintiff retained petitioner on a contingent fee basis to institute such proceedings as might be necessary to accomplish a return of the property. The retainer agreement provided for the payment of a fee ranging from $70,000 to $100,000, the precise amount depending on the extent of legal action necessary to effect a recovery. The agreement made the fee payable only out of the property recovered and granted petitioner an "attorney's lien upon said recovery as security for the payment of said fees." (R. 20-22).[1]

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[1] The retainer agreement was made with the law firm of which petitioner was a partner. Upon dissolution of the firm, petitioner took over prosecution of all the firm's cases (R.19).

Plaintiff discharged petitioner in August, 1950. Thereafter, by stipulation, petitioner consented to the substitution of new counsel and to the surrender to plaintiff of her papers in his possession. Plaintiff agreed that petitioner was to receive $50,000 in the event of an administrative return of the property in suit, or $65,000 should court proceedings become necessary. She also ratified petitioner's liens on the property in suit, agreed to a transfer of petitioner's retaining lien on her papers to the property in suit and further agreed that she would in no way oppose petitioner's motion to intervene in the pending suit for return (R. 13-15).

On November 29, 1950, petitioner filed a complaint (R. 17) and a motion to intervene "as party Plaintiff against Plaintiff herein, to assert with her and on her behalf her claim against Defendant [respondent here] * * *" (R. 16). After hearing and rehearing, the District Court entered an order removing petitioner as counsel for plaintiff and substituting new counsel. The order denied such portion of petitioner's motion as sought intervention to assert "with plaintiff * * * and on her behalf her claim against the defendant," but granted petitioner leave to intervene against plaintiff to "protect the lien claimed by him upon such money or other property as the plaintiff may recover from the defendant by this action or by any settlement thereof" (R. 22-23).

The Court of Appeals' *per curiam* opinion, affirming, held that the "alleged lien * * * on a former client's claim against the government," assuming petitioner had one, arose after the property vested and was therefore barred by Section 9(f) of the Trading with the Enemy Act which declares that, with irrelevant exceptions, vested property "shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court." Accordingly, the court felt it unnecessary to consider whether the lien claimed by the petitioner was invalid for other reasons (R. 24-25).[2]

ARGUMENT

The question presented by petitioner is both unique and narrow. The decision below does not affect the usual attorney's lien. On the contrary, the district court granted petitioner leave to intervene against his former client to protect his asserted lien upon any amount which his former client may recover by judgment or settlement; that aspect of the district court's order was not

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[2] In addition to Section 9(f), the following grounds were also urged:

(1) Petitioner does not have a sufficient "interest" within F.R. Civ. P. Rule 24(a) to intervene as of right.

(2) Assuming petitioner was granted a lien on plaintiff's claim, its assertion in plaintiff's suit is barred by the Assignment of Claims Act (35 Stat. 411, 31 U.S.C. 203), since the suit is against the United States and the underlying claim has not been allowed.

appealed from and is not here in issue. The question here is whether, in addition, petitioner may intervene as of right to join in the prosecution against the United States of a suit which is being presented in good faith by his former client. Petitioner's contention that he has a right so to intervene not only disregards Section 9 (f) of the Trading with the Enemy Act; it also violates the Assignment of Claims Act and, even apart from these statutory bars, would be without merit as a matter of general law.

1. The Attorney General has no interest in the rights and liabilities existing between petitioner and his former client; we are concerned here because petitioner is seeking to assert rights against the Alien Property Custodian. Petitioner has appealed from the denial of intervention "for the purpose of asserting with plaintiff, Madeleine Du Pont Ruoff, and on her behalf her claim against the defendant" (R. 23). In the district court, the claim to intervention was based primarily on an asserted "interest in the property in suit" (R. 16, 18, 19). Here petitioner, although disavowing any assertion of a lien upon the vested property (Pet. 9), seeks to found a claim against the Custodian on an asserted lien upon the former client's cause of action.

(a) As the court below held, Section 9 (f) of the Trading with the Enemy Act precludes the assertion of any such claim against the Custodian.

That section clearly precludes assertion against the Custodian or the vested property of any lien arising after vesting of the property. It provides that, except as authorized by Section 9 (a) (or other sections not here material), vested property while in the Custodian's hands "shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court." Since petitioner's asserted lien interest arose, if at all, long after the property was vested,[3] it cannot, in view of this provision, be judicially asserted against the Custodian.

To escape the effect of the clear language of Section 9 (f), petitioner would have the words "subject to any order * * * of any court" read "subject to any order * * * of any court *other than a court in which a suit under Section 9 (a) is pending.*" But the purpose of the section quite clearly was to preclude the interjection of collateral issues in a suit against the Custodian under Section 9 (a). That is the plain meaning of *La Mettrie* v. *James,* 6 F. 2d 479 (C.A.D.C.), affirmed, 272 U.S. 731. See also *Aronstam* v. *James,* 273 Fed. 545 (E.D.N.Y.); *Kohn* v. *Jacob & Josef Kohn,* 264 Fed. 253, 255 (S.D.N.Y.); *Kahn* v. *Garvan,* 263 Fed. 909, 914 (S.D.N.Y.). There is nothing in the opinion in the *La Mettrie* case, *supra,* to suggest, as does

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[3] A lien interest arising prior to vesting could be asserted by suit under Section 9 (a) for the return of an "interest, right, or title" in the vested property.

petitioner (Pet. 8), that intervention was denied for the reason that the intervenor sought to take the vested property out of the control of the Custodian and the court.

(b) In addition, petitioner's contention would contravene the Assignment of Claims Act (35 Stat. 411, 31 U.S. 203). His asserted interest in his client's cause of action necessarily springs from his former client's undertaking to pay him out of the recovery.[4] To allow him, in his own right,[5] to assert that interest against the United States would, in effect, be to treat that undertaking as an assignment of a partial interest in the client's claim. Since the suit is one against the United States (*Becker Steel Co.* v. *Cummings*, 296 U.S. 74) and the underlying claim has not been allowed, any such assignment would be prohibited. *Cf., e.g., United States* v. *Shannon*, 342 U.S. 288.

(c) Apart from these statutory bars, petitioner's claim is without merit. The traditional attorney's lien is a charging lien on any amount which the client may recover through judgment or settlement. It attached to a judgment or fund produced through the attorney's efforts. "There is no such thing as the lien of an attorney upon a mere

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[4] If there had been no undertaking, petitioner would have had no lien. *Lyman* v. *Campbell*, 182 F. 2d 700 (C.A.D.C).

[5] Petitioner, having been discharged by the client, plainly cannot assert any interest in the client's right.

claim or cause of action which the client has against a third person * * *." *Lamont* v. *Washington & G. R. R. Co.*, 2 Mackey (D.C.) 502, 504. See also *Lyman* v. *Campbell*, 182 F. 2d 700, 702 (C.A.D.C.); Restatement, *Agency*, § 464, comment on cl. (e), pp. 1093-1094 (1933).[6] Absent a claim of collusion or other special circumstances not present here, an interest predicated on an attorney's charging lien has never been held sufficient to permit a discharged attorney to join in the prosecution of a suit which is being pressed by the former client.[7] Indeed, it would seem almost axiomatic that a defendant should not be put to the burden of defending against two plaintiffs merely because the plaintiff has chosen to discharge one attorney and retain another.

2. There is no conflicting decision; indeed, so far as we are aware, the question which petitioner seeks to raise has not been presented in any other

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[6] The retainer agreement here merely grants the attorneys "an attorney's lien upon said recovery" (R. 21).

[7] When permitted, intervention has been allowed, not on the basis of an "interest" possessed by the attorney in the subject matter of the litigation (*cf.*, F.R.C.P., Rule 24 (a)), but as an exercise of the court's inherent power to protect its officers and only where the client seeks to effect a collusive termination of a lawsuit in such a manner as to prevent the production of a fund to which an attorney's lien might attach, thereby depriving the attorney of his compensation. See *Lyman* v. *Campbell*, 182 F. 2d 700, 701, 702 (C.A.D.C.); *Friedman* v. *Harris*, 158 F. 2d 187 (C.A.D.C.); *Sullivan* v. *Tobin*, 42 App. D.C. 430, 434.

action under the Trading with the Enemy Act. In an effort to establish that the problem is of "large importance in the administration of the Act," petitioner starts with the speculative premises that the bulk of claims for the return of vested property are prosecuted on a contingent fee basis and that the fee limitations imposed by the Act, together with other circumstances, make the lot of an attorney handling such claims a difficult one. He then arrives at the remarkable conclusion that unless the courts sanction the right of an attorney, after being discharged, to prosecute his former client's claim, contingent representations will be made "more difficult, if not unavailable," thereby "vitiat[ing] the remedy" given claimants by the Act for the recovery of vested property. (Pet. 4-5, 12). Leaving aside whether petitioner's premises square with experience, his fears of the consequences of an adverse decision are most fanciful. It is quite unlikely that an attorney will refuse a contingent retainer because of the possibility that he may be discharged and because, if discharged, he will not be permitted to continue prosecution of the client's claim. Indeed, it would be no more speculative to argue that to grant intervention of the kind sought by petitioner would produce the very result he seems to fear, in that claimants would be unable to secure new counsel who would be willing to share control of the litigation with discharged counsel. In any event, specu-

lation as to remote possible consequences does not make an important federal question.[8]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Solicitor General.

HAROLD I. BAYNTON,
Assistant Attorney General.

JAMES D. HILL,
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Attorneys.

MAY 1952.

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[8] The issues involved in the instant litigation have also been presented to Congress. On April 8, 1952, the Senate Committee on the Judiciary reported out S. 2546 which is reproduced in the report accompanying it. (S. Rep. 1445, 82d Cong., 2d Sess.). In substance, Section 1 provides that from the commencement of an action, an attorney shall have a lien on his client's cause of action. Section 2 declares:

> No statute forbidding or limiting the assignment of a claim against the United States or the creating or enforcement of a lien against property seized or vested by the United States shall be deemed to apply to the lien established as aforesaid.

Section 3 makes the statute applicable to any action presently pending or hereafter commenced.

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